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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-248

ALGA, INC., d/b/a MONTGOMERY BOOK MART, An Alabama Corporation; and JAMES M. TRINKLE,

PETITIONERS,

v.

DAVID CROSLAND, ESQUIRE, in his capacity as District Attorney for the 15th Judicial Circuit of ALABAMA; and JACK B. RUCKER, ESQUIRE, in his capacity as Police Commissioner for the City of Montgomery, Alabama,

RESPONDENTS.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ISSUE PRESENTED FOR REVIEW

WAS THE UNITED STATES DISTRICT COURT CONSTITUTIONALLY JUSTIFIED, AS AFFIRMED BY THE COURT OF APPEALS, IN REFUSING TO ENJOIN STATE CRIMINAL PROCEEDINGS WHEREIN PETITIONERS ARE, IN FACT, BEING AFFORDED FULL CONSTITUTIONAL SAFEGUARDS?

STATEMENT OF THE CASE

Alga, Inc., d/b/a Montgomery Book Mart and James M. Trinkle, Petitioners here, filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, on April 8, 1971, seeking to enjoin prosecution under Alabama Obscenity Statutes and also seeking a declaratory judgment that such state statutes were unconstitutional. The Defendants in the District Court were David Crosland, in his capacity as District Attorney for the 15th Judicial Circuit of Alabama, and Jack B. Rucker, in his capacity as Commissioner of Public Affairs for the City of Montgomery, Alabama. The Petitioners amended their complaint on June 12, 1971, to allege additional state charges.

On June 18, 1971, the District Court granted the motion to dismiss the complaint which had been filed by the District Attorney and by the Commissioner of Public Affairs for the City of Montgomery, and which motion had been argued orally before the Court by counsel for Plaintiffs and Defendants below.[1] In dismissing the complaint, the District Court followed the cases of *Younger v. Harris,* 1971, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669; *Boyle v. Landry,* 1971, 401 U. S. 77, 91 S. Ct. 758, 27 L. Ed. 2d 696; *Samuels vs. Mackell,* 1971, 401 U. S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688; *Dyson v. Stein,* 1971, 401 U. S. 200, 91 S. Ct. 769, 27 L. Ed. 2 d 781; *Perez v. Ledesma,* 1971, 401 U. S. 82, 91 S. Ct. 674, 27 L. Ed. 2d 701; *Byrne v. Karalexis,* 1971, 401 U. S. 216, 91 S. Ct. 777, 27 L. Ed. 2d 792. The decision of the District Court was af-

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1. The decision of the District Court is reported as *Alga,* Inc. v. Crosland, 327 Fed. Supp. 1264.

firmed after oral argument by the United States Court of Appeals for the Fifth Circuit. 459 F. 2d 1038 (1972).

The Petitioners, Alga, Inc., and James M. Trinkle, refer in their complaint before the District Court and in their brief before the Court of Appeals to the state criminal proceedings which they seek to federally enjoin. In order to afford the Appellate Court a complete presentation of the issues, the Respondents herein, David Crosland, as District Attorney of the 15th Judicial Circuit of Alabama, and Jack B. Rucker, as Commissioner of Public Affairs of the City of Montgomery, with leave of the Court below supplemented the record by the inclusion therein of the criminal proceedings against the Petitioner, James M. Trinkle.

The record shows that there are now four criminal cases against James M. Trinkle on appeal to the Court of Criminal Appeals of Alabama. The complete transcripts of these proceedings have been transmitted to the State Appellate Court.

The record shows that the first of these cases was commenced by arrest on April 1, 1971, pursuant to a warrant issued by the County Court of Montgomery County, Alabama, and that the other three cases were commenced by arrest also pursuant to warrant on April 9, 1971. Each arrest warrant is supported by an affidavit setting forth the specific publication as constituting a violation of Title 14, § 374(4), Code of Alabama, 1940, as amended. Prior to the arrest in each case, the Petitioners were furnished with a list of publications in accord with the provisions of Act 698, Acts of Alabama, Regular Session, 1969. In fact, as shown by the complaint, the Petitioners were given

some five days' notice prior to the first arrest, during which period the Petitioners, by their own admission, were permitted to continue the operation of the book store.

The Petitioner Trinkle demanded a trial by jury in the Montgomery County Court and the cases were subsequently transferred to the Grand Jury Calendar in accord with Alabama Law. (*Streanger v. State*, 21 Ala. App. 600, 110 So. 595). The Grand Jury, upon its review of these cases, returned indictments on May 13, 1971. Petitioner Trinkle then filed a motion to quash the indictment, demurrers to the indictment, and a "Motion for Directed Verdict and/or in the Alternative to Dismiss". These demurrers and motions attack the constitutionality of Title 14 §§ 374(1) through 374(16), and of Act 698, supra, as all being repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The demurrers and motions present some sixty-two constitutional grounds of attack.[2] When the trial court denied the motions and overruled the demurrer, Petitioner Trinkle withdrew his jury demand and entered a plea of not guilty in each case upon an agreed stipulation of facts. The agreed stipulated facts included introduction of such publications entitled "Never Soft Always Hard", "Seduced in Every Way", "Tip to Bottom", "Call Boy", and others of similar nature. The State trial court, upon review of the evidence, entered the following decree:

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2. The questions of overbreadth, first amendment protection, the issue of "chilling and inhibiting effect", substantive due process, deprivation of liberty and/or property interests, prior restraint, obscenity *vel non* are all thoroughly raised in the state proceedings.

" The Defendant, appearing in person and by and through his attorney of record, withdraws his demand for trial by jury and enters a plea of not guilty without waiving any preliminary questions and insisting upon the Motion to Quash the Indictment, the Demurrer and Motion to Dismiss,

The Court is of the opinion that the Demurrer should be overruled, and the Motion to Quash and the Motion to Dismiss should be denied.

This cause then being submitted to the Court on an agreed stipulation of the facts, the Court finds as follows:

1. That there are no ideas presented in any of the materials having even the slightest social importance and furthermore the materials contain no redeeming social value;

2. The materials appeal solely to purient interest;

3. To the average person, applying contemporary community standards, the dominant theme of the materials, taken as a whole, appeal to the purient interest;

4. By present day standards of the community, the materials offend the common conscience of the community.

It is, therefore,

ORDERED, ADJUDGED and DECREED that the Demurrer be and the same is hereby overruled; that the Motion to Quash be, and the same is hereby denied and that the Motion to Dismiss be, and the same is hereby denied. It is further

CONSIDERED, ORDERED and ADJUDGED by the Court that the Defendant is guilty as charged in the indictment and a fine of $2,000.00 is assessed against him by the Court; said fine and costs not being presently paid, or otherwise secured, the said Defendant is sentenced to hard labor in the Montgomery County Jail for 515 days for the fine and 28 days for the costs and he is also sentenced to one year imprisonment in the County Jail for the sentence, said one year sentence to run concurrently with Cases No. (6331, 6332, 6333, and 6334).

And questions of law arising in this case for the decision of the Supreme Court and the Criminal Court of Appeals of Alabama, the Defendant in open Court gives notice of appeal and requests a suspension of the sentence pending appeal. It is, therefore,

CONSIDERED and ADJUDGED by the Court that this sentence be, and the same is hereby, suspended pending appeal and the Defendant admitted to bail in the sum of $3,000.00 to be approved by law."

REASONS FOR DISALLOWANCE OF WRIT

THE UNITED STATES DISTRICT COURT WAS CONSTITUTIONALLY JUSTIFIED, AS AFFIRMED BY HE COURT OF APPEALS, IN REFUSING TO ENJOIN STATE CRIMINAL PROCEEDINGS WHEREIN PETITIONERS ARE BEING AFFORDED FULL CONSTITUTIONAL SAFEGUARDS.

The complaint before the Courts below affirmatively shows that the Petitioners were continuing to operate their "adult book store". The complaint addi-

tionally shows that the Petitioner Trinkle was, in fact, being afforded affirmative state relief by virtue of habeus corpus and appellate processes in the state proceedings. The District Court, in referring to the circumstances, held that:

> ". . . there is no present threat of any future injury until a determination of the matter by the Courts". (app. 276).

It is significant to note that the Petitioner Trinkle demanded and was afforded the right to a trial by jury in the state misdemeanor proceedings, and that thereupon, in accord with Alabama Law, the cases were transmitted to a Grand Jury for review. Indictments were subsequently returned.

Petitioner Trinkle filed motions to quash and demurrers to the indictment and also filed a motion for a directed verdict. In these responsive pleadings, the same constitutional issues are presented in the state proceedings as are sought to be raised before this Court.

When the demurrer to the indictments and the motions were denied by the state trial judge in each case, the Petitioner withdrew the demand for a jury trial and entered a plea of not guilty upon a stipulation of facts. The cases against Petitioner Trinkle have now been, in fact, transcribed and transmitted to the Court of Criminal Appeals for the State of Alabama. The Petitioners now ask this Court to speculate that the state appellate tribunal will not afford a constitutional review of the issues there presented.

It is well settled that mere apprehension that the state court will not adequately protect a federal right is not a sufficient basis for the issuance of a federal injunction against state proceedings. *Amalgamated*

Clothing Workers v. Richman Brothers, 348 U. S. 511, 518, 75 S. Ct. 452, 456, 99 L. Ed. 600 (1955); *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Engineers,* 398 U. S. 281, 90 S. Ct. 1739, 26 L. Ed. 234 (1970); Where an injunction is improper, declaratory relief should not be given. *Samuels v. Mackell,* supra.

The Supreme Court in *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Engineers,* supra, clearly held:

> "First, a federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear."

Petitioner Trinkle is at the present time, indeed, being afforded a full and meaningful review of the legality of his two arrests, and of his subsequent convictions. The United States Supreme Court has specifically held that the propriety of arrests and the admissibility of evidence in state criminal prosecutions are matters properly to be resolved by state tribunals. *Stefanelli v. Minard,* 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951); *Perez v. Ledesma,* supra, 91 S. Ct. 674, at pp. 676-677.

The state court has suspended the sentences pending appeal and for aught that appears in this record, the Petitioner continues, as found by the District Court, to operate the "adult book store" and to advertise adult-type movies and literature. In any event, there is absolutely no showing that these Respondents have, in fact, prohibited a continued legal operation by Petitioners.

The United States Court of Appeals for the Fifth Circuit has followed the *Younger* series of cases in the following decisions: *Gornto v. Thomas,* 5th Cir. 1971, 439 F. 2d 1406; *Gordon v. Landrieu,* 5th Cir. 1971, 442 F. 2d 926; *Peoples v. City of Birmingham,* 5th Cir. 1971, 440 F. 2d 1352; *Coleman v. Yokum,* 5th Cir. 1971, 442 F. 2d 351; *Livingston v. Garmire,* 5th Cir. 1971, 442 F. 2d 1322; *Duncan v. Perez,* 5th Cir. 1971, 445 F. 2d 557; *LeFlore v. Robinson,* 5th Cir. 1971, 446 F. 2d 715.

These cases establish that the allegations of the instant complaint fail to establish sufficient grounds for federal injunctive and declaratory relief. This is not a case which falls within one of the narrowly drawn exceptions to Title 42, U. S. C. A., § 2283.

The complaint in this case fails to factually allege the narrow class of circumstances required by the recent decision of this Court in *Mitchum v. Foster,* ..... U. S. ....., 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972). The District Court and the Court of Appeals below were entirely justified from the record in finding an absence of sufficient factual allegations that the Petitioners were in danger of suffering great and immediate irreparable harm, or that they were being prosecuted in bad faith, without expectation of conviction and only for harrassment.

In *Coleman v. Yokum,* supra, in a case wherein a defendant sought to enjoin state criminal proceedings on the basis of an alleged unconstitutional state statue and upon the further ground that the state proceedings prohibited his right to a speedy trial, the Court held:

"Under these decisions (Younger, Boyle, Samuels,

Dyson, Perez and Byrne) the allegations of the complaint do not entitle Coleman to relief in the federal courts while his prosecution is pending in the state courts. *In those courts he will be able to attack the constitutionality of Article 580 of the Louisiana Code of Criminal Procedure and also to assert his right to a speedy trial.*" (Emphasis added)

From an analysis of the Appellate decisions as set forth above, and of the *Younger* series of cases, together with *Mitchum v. Foster*, supra, it is apparent that before a federal court will enjoin a state criminal prosecution, it must be factually alleged and factually supported that a defendant is being prosecuted in state court without expectation of conviction and only for harrassment. The injury must be a continuing one in order to afford equitable relief. The remedy of the state proceedings must be factually alleged to be inadequate to protect the constitutional rights of a defendant. The instant complaint fails to factually allege actionable conduct within the meaning of *Mitchum v. Foster*, supra, and of the Younger series of cases. The actual record of the state criminal proceedings establishes that Petitioners' constitutional rights are being protected.

When the rather lengthy complaint of Alga, Inc., and Mr. Trinkle is carefully analyzed, it becomes apparent that their conclusion of harassment and bad faith is drawn from four charges involving two arrests pursuant to Title 14, § 374(4) of the Alabama Code and the bond expense in these cases; from the state proceedings pursuant to Act 698 of the Alabama Legislature; and from what was allegedly said to Petitioner Trinkle by the local law enforcement officials.

The arrests were made after warrant for violation

of an Alabama criminal statute which was held constitutional by a three-judge federal court in the case of *Entertainment Ventures, Inc., v. Brewer*, 306 Fed. Supp. 802 (1969). Mr. Trinkle was afforded full review of the monetary amounts of the bonds and, in fact, did obtain relief in the state proceedings. It cannot be said that the Commissioner of Public Affairs and the District Attorney acted without expectation of conviction when they were proceeding pursuant to a law previously declared to be constitutional and when warrants issued by the Judge of the County Court of Montgomery County were based on affidavits setting forth the specific publications listed, i.e. "Never Soft Always Hard", "Seduced in Every Way", "Tip to Bottom", etc.[3]

The subsequent proceedings as shown by the record in the cases of Petitioner Trinkle establish the fact that these cases were handled in accord with normal and customary state criminal procedure and with the express purpose of seeking conviction for the violation of a constitutional criminal statue. The Petitioner Trinkle was allowed to make a single stipulation of facts applicable to each of the four cases. The hearings in each case were consolidated, for all practical purposes, and presented to the state trial judge at the same time. All penalties have been suspended pending the state appeals.

The notice which Alga, Inc., and James M. Trinkle received with regard to the list of material being sold

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3. Petitioners make no assertion in their District Court complaint or before this Court that the County Judge issued the warrants without making a constitutionally sufficient inquiry into the factual basis of the officers' conclusion.

was transmitted to them in accord with and pursuant to §4 of Act 698, supra. This section reads as follows:

"*Section 4.* (a) No prosecution may be commenced against a person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.

(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the followng officials: the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act."

The Petitioners, upon receipt of this notice had a clearly defined state remedy under the provisions of Section 4(c) as set forth above, but chose not to pursue this state remedy. Act 698 envisions an adversary proceeding prior to seizure and contains procedural safeguards. The list of publications, as initially determined

by the state officials to present reasonable cause to believe that there had been a violation of the Obscenity Law, includes such publications as "Masturbation and the Phallus", "Teenage Studs", "Young Boys and Sodomy", and "The Gay Sucker". This material itself establishes the good faith of the officials in their effort to enforce the law. There can be no actionable harassment in light of the state remedies available to Petitioners, Alga, Inc., and Trinkle, and especially in view of the acts which the Respondent State Officials were doing their best to regulate.

The case actually boils down to whether an accused in state criminal proceedings may constitutionally invoke federal injunctive jurisdiction by allegation of statements proportedly made by state law enforcement officers. If such were the law, defendants throughout the Nation could effectively halt almost any state criminal proceedings until the factual determination of what was and what was not said and the true context of such alleged statements was litigated in federal district court. This cannot be permitted.

The Petitioners complain that the names of customers were taken; that photographs of the business premises were made; that a trash container at the bookstore was searched; and that they were threatened with being run out of town. In every well handled criminal case, law enforcement officers compile lists of witnesses, oftentimes including business customers, associates and neighbors. To photograph the scene of an alleged crime is common in criminal investigation. Evidence is sought in trash containers every day in connection with normal and customary law enforcement work. Every defendant could allege that he was told something by an arresting officer which the accused

did not like, i.e. "The likes of you are going to have to leave this town", "You are going to jail", or hundreds of variations. These types of anxieties and inconveniences, together with bail and legal expenses were found by the Supreme Court in *Younger*, supra, not to constitute grounds for invoking federal injunctive relief.

The factual allegations of this case and the record of the state criminal proceedings show without question that Petitioner Trinkle was prosecuted with definite expectation of conviction under a criminal statute previously held constitutional by a three-judge federal tribunal. It is without factual dispute that the Petitioner is seeking and is being afforded constitutional protection in the State Courts. The Petitioners themselves allege that although they are limited, they are, in fact, "presently operating" their "adult book store."

The irreparable injury as set forth in *Dombrowski*[4] and as defined in *Younger*, supra, must be such as to effectively deprive a person of meaningful review on state appeal and to circumvent the constitutional rights of a defendant.

There is no factual allegation of such before this Court and neither is there a factually sufficient allegation that these Respondents prosecuted Petitioner Trinkle without expectation of conviction. Mr. Trinkle may not have liked being put through the process of arrest, trial and conviction, with the attendant unpleasant circumstances. However, as pointed out in *Younger*, supra, these factors of "costs, anxieties, and inconveniences" are incident to every criminal prosecu-

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4. *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

tion and are not subject to and cannot form the basis for federal injunctive relief.

This Court, in *Cameron v. Johnson,* 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), held that under *Dombrowski,* supra, a federal court should refuse to enjoin state criminal proceedings unless the federal jurisdiction affords the Petitioners "protection which they could not secure by prompt trial and appeal pursued to this Court". The Court, in *Cameron,* supra, also significantly noted:

> ". . . the question was whether the statute was enforced against them with no expectation of conviction but only to discourage exercise of protected rights".

The District Court below, after analyzing the complaint and the publications lists attached thereto concluded:

> "Some may even think that the state officials are derelict in their duty for not seeking additional prosecutions for the continued apparent violation of the state law."

In this regard, the Supreme Court, in *Cameron,* supra, held:

> "In any event, upon the adoption of the law, it became the duty of the authorities in good faith to enforce it and to prosecute for picketing that violated that law."

The state court found that the literature sold by Petitioners was such as to contain "not even the slightest social importance"; "no redeeming social value"; and that it was appealing "solely to purient interests". The correctness of this determination is not the issue

here—however, the list of publications themselves establishes the good faith justification for the state finding. It cannot be said that these Petitioners have not secured fair treatment in state court. It cannot be said nor has it been alleged that these Petitioners are not being afforded a full and fair appellate review in the state proceeding.

CONCLUSION

The Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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September 1972